

DECISION



C. Eastwood, Jr.
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

7809

FILE: 8-192058

DATE: September 21, 1978

MATTER OF: Accent General, Inc.

DIGEST:

1. Where bid bond was in excess of difference between low bid and next low bid, failure to provide required amount of bid guaranty was properly waived pursuant to ASPR § 10-102.5 (11).
2. Attorney in fact of the insurance company shown on the bid bond who is authorized by the company to execute, acknowledge and deliver "Contract Bonds, License & Permit Bonds, Court Bonds, Fiduciary Bonds, and Miscellaneous" is authorized by the term "Miscellaneous" to issue bid bonds so that the insurance company would be liable on a bid bond issued by the attorney in fact.
3. Where it cannot be determined substantially from the IFB and bid itself whether a mistake was made in the unit price or the extended total shown on the bid, but the bid is low in either situation, evidence establishing the mistake and intended bid may be received from outside the IFB and bid itself, and the bid corrected according to the intended bid.
4. Unbalanced bid based on confirmed reasonable estimates of Government's requirements is not nonresponsive or otherwise precluded from consideration for award just because it is unbalanced unless there is evidence of irregularity affecting the competitive bidding system or substantial doubt that award will in fact result in lowest cost to Government.
5. To the extent protester objects to contracting officer's affirmative determination of responsibility, GAO does not review such matters except in circumstances not applicable here.
6. Contracting officer's report, which was not part of the Navy's report concerning the protest nor furnished to GAO, need not be furnished protester where circumstances of the case make it very unlikely that contracting officer's report would have any effect on the outcome of the protest.

Accent General, Inc., the second low bidder under invitation for bids (IFB) No. N62474-77-C-2099, issued by the Naval Facilities Engineering Command, protests that an award should not be made to the apparent low bidder, Pacific Enterprises (Pacific), because Pacific's bid was nonresponsive and because Pacific is believed to be nonresponsive. The IFB advertised a maintenance project on three dry docks in the Long Beach Naval Shipyard. The IFB separated the project into six sub-items, five of which called for unit prices, that were to be aggregated for the total bid price.

Accent General believes that Pacific's bid should be rejected because: (1) Pacific's bid guarantee was insufficient because it was limited to \$30,000, whereas the standard 20 percent figure contained in the Instructions to Bidders dictated that the bid guarantee be approximately \$46,000; (2) Pacific made errors in extension of the unit prices for five sub-items that were not correctable under established mistake in bid procedures; (3) Pacific's bid was unbalanced; and (4) Pacific was nonresponsive.

Pacific's bid guarantee, which was provided in the form of a bid bond, was limited to \$30,000, even though a guarantee of 20 percent of the bid price as called for in the Instructions to Bidders would have slightly exceeded \$46,000. Accent General cites General Elevator Company, Inc., B-139277, October 3, 1977, 77-2 C.D. 256, for the proposition, with which we agree, that an incomplete or inadequate bid guarantee is a material deviation from IFB requirements which should result in a finding of nonresponsiveness of the bid. However, in General Elevator the bid bond submitted was limited to \$3,000, was not 20 percent of the bid price, and was not equal to or greater than the difference between the apparent low bidder's bid and the second low bid. In this case the difference between Accent General's and Pacific's bid is approximately \$5,000, and Pacific's bid bond is equal to or greater than the difference between the pertinent bids. It is therefore covered by section 10-102.5(ii) of the Armed Services Procurement Regulation (ASPR) (1976 ed.), which provides that:

"Noncompliance with Bid Guarantee Requirements.

Absent either (i) the existence of one of the following situations or (ii) a written determination by the contracting officer that, notwithstanding the existence of one of the following situations, acceptance of the bid would be detrimental to the Government's best interests, noncompliance with a solicitation requirement that the bid be supported by a bid guarantee will require rejection of the bid (See 2-404.2(h)):

* * *

"(ii) when the amount of the bid guarantee submitted, though less than the amount required by the invitation for bids, is equal to or greater than the difference between the price stated in the bid and the price stated in the next higher acceptable bid, * * *."

In circumstances similar to those here, our Office found in Larry Loffredo Construction Company, B-186380, April 22, 1977, 77-1 CPD 279, that the bid guarantee was adequate and that the only possibility of the agency rejecting the bid was upon the written determination by the contracting officer that acceptance of the bid would have been detrimental to the Government's best interests. Larry Loffredo, supra, suggests that one of the reasons that the contracting officer may properly use in determining to reject a bid because of an insufficient bid guarantee, even though the guarantee equals the difference between the apparent low bidder's bid and the second low bidder's bid, is the apparent low bidder's inability to obtain a bond in the amount of 20 percent of the bid price because of financial or related reasons. Accent General suggests that Pacific might have financial problem, which would render Pacific nonresponsible. However, the Navy has not made such a determination in this case.

Accent General appears to believe that the Navy has the burden of proving incorrect its allegation that Pacific is nonresponsible. There is no need to argue this point because the Navy is required by ASPR to make an affirmative determination of responsibility before an award is made, and we assume that the Navy has or will perform this function. In any event our Office does not review protests concerning affirmative determinations of responsibility, unless either fraud is shown on the part of the procuring officials or the solicitation contains definitive responsibility criteria, which allegedly have not been met. Rushton Industrial Construction, B-191825, June 12, 1978, 78-1 CPD 427. Accent General has alleged neither fraud nor definitive criteria in this case.

Accent General also alleges that Pacific's bid bond is deficient because the insurance company's attorney in fact was not specifically authorized in the general power of attorney issued by the company to issue bid bonds. The general power of attorney authorizes the insurance company's attorney in fact to execute, acknowledge and deliver "Contract Bonds (S.B.A. Guarantee Agreement) - \$249,999.99; License & Permit Bonds - \$50,000.00; Miscellaneous - \$50,000.00; Contract Bonds - \$50,000; Court Bonds - \$50,000; Fiduciary Bonds - \$50,000." Although a bid guarantee might not technically be included within the term "Contract Bonds," we see no doubt that a bid guarantee would be covered under the term "Miscellaneous." The general power of attorney authorizes the attorney in fact to act for the insurance company in the procurement field, within the stated limits, and we see no reason to believe that the company would not be held liable on the bond if Pacific failed to proceed with the project.

In each of the five sub-items in the IFB which called for unit prices, there was a discrepancy between the result that was recorded on the IFB by Pacific and the extension of the unit price stated on the IFB by Pacific. The aggregate discrepancy is slightly in excess of \$15. Accent General makes the point, with which we agree, that it cannot be determined simply from examining Pacific's bid whether the unit price or the extended result for each sub-item was in error. And Accent General cites 51 Comp. Gen. 283 (1971) and 49 Comp. Gen. 12 (1969) for the proposition that where it cannot be determined by examining the bid whether the unit price or the extended result is in error, the low bid must be rejected.

In the cited cases the bids involved would have been low on the basis of the extended result that was written on the IFB but second low on the basis of the correctly extended result based on the unit price that was written on the IFB. Therefore, a displacement of the low bidder would have been involved by an election to ignore the correct extension of the unit prices written on the IFB. These cases, forbidding correction of the mistaken unit price and requiring rejection of the bid, are in accord with the proviso in the applicable ASPR section 2-406.3 (3) which states, "* * * that, in the event such correction [of a mistake in bid] would result in displacing one or more

lower bids, the determination [to allow correction of a mistake in bid] shall not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself." However, immediately preceding the quoted proviso, section 2-406.3(3) states that a mistake in bid may be corrected as long as " * * * clear and convincing evidence establishes both the existence of a mistake and the bid actually intended * * *" without indicating that the evidence must come substantially from the invitation and bid itself. Thus, there is a clear contrast in this subsection concerning the establishment of a mistake in bid between the situation where a correction of the mistake would displace a lower bidder and the situation where the correction would not affect the standing of the bidders.

There is no question in this case that Pacific would have the low bid whether the correct extension of its stated unit prices in the IFB is used or whether the extended result appearing on the IFB is used. Since no displacement of a bidder is involved, it is permissible to get the evidence establishing the mistake and intended bid from outside of the submitted bid and IFB, and our Office has decided in these circumstances that Pacific's bid would not have to be summarily rejected. See Broken Lance Enterprises, Inc., 57 Comp. Gen. 410 (1978), 78-1 CPD 279.

The Navy has determined that clear and convincing evidence has been presented by Pacific to establish the mistake and the bid intended in the form of a letter which states in part, "The discrepancy is the result of our having calculated the total cost per item to accomplish the work and dividing that cost by the number of units involved, which using a calculator having a two decimal point accuracy rounded off the result as we have submitted." We have verified Pacific's explanation and agree with the Navy that clear and convincing evidence has been presented by Pacific as to the mistake and the bid intended. Therefore, even though it came from outside the IFB and Pacific's bid, it may properly be considered as establishing Pacific's intended bid. Broken Lance Enterprises, Inc., supra.

We disagree with the Navy about the correction of the discrepancy in the extension of Pacific's unit prices. The Navy proposes award to Pacific on the basis of the extension of the unit prices listed by Pacific in the IFB because

paragraph 2c on page B1-2 of the IFB requires the unit price to control in the event of a discrepancy between unit price and extended total. However, 51 Comp. Gen. 283 (1971), *supra*, makes clear that this kind of provision only controls if there is an error in the extension of the unit price. Where there is convincing evidence that the error occurred in the recording of the unit price, rather than its extension, the error is dealt with in accordance with the established principles of error correction. The letter previously referred to, furnished by Pacific and accepted by our Office and the Navy as establishing the mistake and intended bid, shows that Pacific's total amounts listed on the IFB were the intended bid and not the unit prices that were listed. Thus the error occurred in the recording of the unit price, even though the error was only made because of the limited capacity of the calculator. Therefore, the proper correction to make to Pacific's bid is a correction of Pacific's unit prices that would permit their extension to equal the totals listed on the bid.

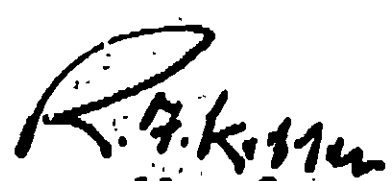
Accent General compares Pacific's bid of \$50,243.64 for sub-item 1a to the other bids of \$112,019, \$160,832, and \$166,447 for the same sub-item and draws the conclusion that Pacific submitted an unbalanced bid. Conceding that Pacific's bid may be unbalanced, that fact does not render it nonresponsive nor preclude it from consideration for award. The result in this case is determined by Oswald Brothers Enterprises, Incorporated, B-180676, May 9, 1974, 74-1 CPD 238, which concerned an IFB including sub-items calling for unit prices based on estimated quantities, and concerned a bidder that proposed a very low unit price for one of the sub-items. Oswald held that the bid should be considered for award stating:

"Although we have held that an unbalanced bid which is evaluated low should not be considered for award where there is substantial doubt that award to that bidder will result in the lowest cost to the Government, B-172789, July 19, 1971, we do not believe that such doubt exists in this case because the procuring activity has determined that the estimated quantities stated in the IFB for evaluation purposes represent a reasonable forecast of the Government's probable requirements and the Government will control the repairs required by inspection and payment therefor. Therefore, we do not believe Municipal's unbalanced bid gives that company a competitive advantage over other bidders or will result in other than the lowest cost to the Government."

The Navy stated in its report, "With regard to an alleged unbalancing of bid, it is pointed out that the unit prices of the sub-items come into play only when there is an increase or decrease in the quantity listed." That statement has been confirmed by the Navy to mean that the estimated quantities listed in the IFB are in fact firm estimates of the Government's requirements. Therefore, the fact that Pacific may have submitted an unbalanced bid in this case does not require rejection of the bid because it appears that a proposed award to Pacific would result in the lowest cost to the Government.

Even though Accent General requests that a copy of the contracting officer's report, which was not included with the Navy's report, be provided so that additional comments may be made if warranted, we do not believe that would be useful at this point. Accent General has seen everything, including the Navy's report, that has been made available by the Navy for our Office's decision on the protest, and we believe that it is very unlikely that there is anything in the contracting officer's report that would alter the legal effect of the decisions previously cited in the circumstances of this case.

Accordingly, there is no legal basis to question the proposed award of the contract to Pacific and the protest of Accent General is therefore denied.


Acting Comptroller General
of the United States